NO. 3519

In the United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

DANIEL DE LA NUX, GEORGE F. DE LA NUX and LAHAPA DE LA NUX,

Plaintiffs-in-Error,

vs.

REBECCA HOUGHTAILING, through and by FREDERICK E. STEERE, her Guardian,

Defendant-in-Error.

BRIEF OF DEFENDANT-IN-ERROR.

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Defendant-in-Error.

No. 3519

BRIEF OF REBECCA HOUGHTAILING THROUGH AND BY F. E. STEERE, HER GUARDIAN—DEFENDANT-IN-ERROR.

STATEMENT OF THE CASE.

The defendant-in-error, Rebecca Houghtailing, is a part-Hawaiian woman sixty-four years old, being under guardianship as a spendthrift by decree of the Circuit Court of Hawaii dated April 12th, 1916. (Tr., p. 45.) She for twenty years previous to the trial in this case had been "a common drunk," or partially intoxicated every day, spending from $60 to $250 a month on liquor. (Tr., pp. 49, 131, 158, 179, 93.) All this time her affairs were in the hands of

an agent or trustee. (Tr., p. 61.) Her son, one of the plaintiffs-in-error, George De La Nux, had been taken by his grandparents when an infant to another island, never seeing his mother till he was seven years old, and until 1900, when he was twenty-four years of age, seeing her only two or three times. (Tr., pp. 293-295.) When he was twenty-one he knew she was of independent means. (Tr., p. 295.) In 1900 he went to work on a plantation and very seldom saw his mother after that. (Tr., pp. 298-300.) In 1905 he went with his mother to a lawyer's office and she signed the deed of gift sought to be reformed. The deed is dated June 10th, 1905; acknowledged November 8th, 1905, and recorded July 2nd, 1910. In the middle of the deed these are the words sought to be cancelled—

"and also all and singular my Real and Personal property by me possessed and wherever situate."

This deed is in the main a deed of a homestead to two minor children of said George F. De La Nux, reserving to the defendant-in-error a life estate (Tr., p. 10), and the judgment of the Supreme Court of the Territory of Hawaii affirms the decree of the Circuit Court cancelling said phrase on the ground that it was inserted by fraud. The defendant-in-error testified she did not know till 1914 or 1915 that the deed conveyed all her other property valued at Forty Thousand Dollars ($40,000). (Tr., p. 89.) Shortly afterwards, urged by one of her other sons, she engaged counsel to have the deed reformed. Pre-

vious to this suit a demand to have the deed reformed was made on George F. De La Nux, and he was accused of committing the fraud by his mother in the presence of counsel, which accusation he did not deny. George F. De La Nux was the natural guardian of the children (pp. 310-311, 363, Revised Laws of Hawaii, Sec. 2993). After this interview when his mother was very sick her son, George F. De La Nux, when he was "playing safe," drafted a letter for his mother, discharging her attorneys (Tr., p. 319), and later got her to give him a power of attorney.

The case is one in equity coming to this court by writ of error. An appeal in equity to the Supreme Court of Hawaii was dismissed (Tr., p. 385), and under the statute of Session Laws of Hawaii, 1919 (Act 44), the right to a writ of error in suits in equity is given, and this case was reviewed by the Supreme Court of the Territory of Hawaii. The questions of law are:

> Is the evidence on the whole case sufficient to justify the affirmance of the decree?
>
> Is there any evidence to justify the finding that the defendant-in-error was not guilty of laches?

The other assignment of error as to a demand is a matter of pleading which was not reserved or raised by the plaintiffs-in-error in the Supreme Court of the Territory of Hawaii.

ARGUMENT.

Laches are not to be charged against one in possession claiming ownership.

Ruckman v. Corey, 129 U. S. 387,

in which Mr. Justice Harlan says:

"Laches, the Supreme Court of Illinois has well said, cannot be imputed to one in peaceable possession of land for delay in resorting to a court of equity to correct a mistake in the description of premises in one of the conveyances through which the title must be deduced. The possession is notice to all of the possessor's equitable rights, and he needs to assert them only when he may find occasion to do so."

Schroeder v. Smith, 249 Ill. 574.

Harris v. Ivy, 114 Ala. 363.

Jones v. McNeally. 139 Ala. 378.

Bigelow on Estoppel, 6th Ed., p. 661.

Laches means not merely lapse of time, but that the complainant being competent, has knowingly slept on his rights to the injury of the defendant.

It should be borne in mind that this case is for the reformation of a deed of gift to take place *in futuro* for which no consideration was given, made by an incompetent woman upon whom a fraud was perpetrated, she keeping possession of all the property and making a claim to its absolute ownership as soon as informed of the deed, and the defendants have not been injured by any delay, but the situation remains the same as in 1905.

This court in the case of *London & San Francisco*

Bank v. Dexter Horton & Co., Bankers, et al., 126 Fed. 593, lays down the law in regard to laches as follows:

"No hard and fast rule has been laid down by the courts which can be said to govern all cases wherein the defense of laches is involved. The lapse of time which might induce the application of the doctrine is not a determined period, but depends upon the circumstances of the particular case. One principle pervades all cases involving the defense of laches, however, and that is, that not only must there be a seemingly unnecessary delay on the part of the plaintiff in bringing or prosecuting his action, but that by reason of some change in the condition or relations of the property or parties occurring during the period of delay, it would be inequitable to permit the claim of the plaintiff to be enforced. *Galliher v. Cadwell,* 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738; *Halstead v. Grinnan,* 152 U. S. 412, 14 Sup. Ct. 641, 38 L. Ed. 495; *Wheeling Bridge & T. Co. v. Reymann Brewing Co.,* 61 U. S. App. 531, 90 Fed. 189, 32 C. C. A. 571. As defined in the case of *Demuth v. Bank,* 85 Md. 326, 37 Atl. 268, 60 Am. St. Rep. 322:

" 'Laches is such neglect or omission to assert a right as, taken in conjunction with lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity * * * There must be a legal duty to do some act, a failure to do that duty, and attendant circumstances which cause prejudice to an adverse party, before the doctrine of laches can be successfully invoked.' "

In *Wallaston v. Tribe,* L. R. 9 Eq. 44, Lord Romilly said:

"Great stress was laid on the lapse of time but I think nothing of that because all the persons inter-

ested are in the same state now as they were then. If there had been any delay which had altered the state of matters that might have raised a question. There is nothing of the sort."

And the cases of—

Rose v. Parker, 4 Haw. 593;
Magoon v. Lord Engineering Co., 22 Haw. 327-349;
Lucas v. American-Hawaiian E. & C. Co., 16 Haw. 87,

adopt the same rule.

Northern Railroad Co. v. Boyd, 228 U. S. 421.
Townsend v. Vanderwerker, 160 U. S. 171.

The case most like this, and yet not so strong as this case, is *McIntyre v. Proyor,* 173 U. S. 38, where an ignorant woman allowed nine years to elapse, but in that case she had received a consideration therefor, and was not in actual possession. Moreover, there was no question about the lapse of four years.

Where the lapse of time is uncertain and there are disputed facts involving questions of excuse, of the time when the fraud was discovered, laches is a question of mixed law and fact to be found as a fact by the jury or the court under proper rules of law.

In this case the question of when Mrs. Houghtailing became aware of the fraud is not definite and the court could have found that she only became aware of it one year and a half previous to the suit.

Likewise her mental condition during that period is a question of fact to be passed upon as excusing delay. Consequently the finding for the complainant must be construed by the court as a finding of fact on the most favorable evidence for the complainant.

Gatling v. Newell, 9 Ind. 572.
Holbrook v. Burk, 22 Pick. 546.
Kingsley v. Wallace, 14 Main 57.
Mannahan v. Noyce, 52 N. H. 232.
Bigelow on Fraud, 1st Ed., p. 448.

No judgment or decree of the Territory's highest court can be reviewed by this court on a matter of fact alone.

Grayson v. Lynch, 163 U. S. 468.

In equity cases the Supreme Court of the Territory of Hawaii can find the fact as well as the law.

Godfrey v. Kidwell, 15 Haw. 526.

Cha Fook v. Lau Pui, 10 Haw. 308.

If Mrs. Houghtailing had died, then her heirs could set up this fraud in a defense to a writ of entry for possession.

So far as the personal property is concerned, there having been no delivery and no consideration, the gift fails upon her repudiation of the deed.

20 Cyc. 1195 cases.

Basye v. Basye, 152 Ind. 582.

This brings up the whole case both of the real and personal property. A deed of real property reserving a life estate to the grantor operates as a cove-

nant to stand seised to uses. In other words, in conveyance under the common law, delivery was necessary and an estate *in futuro* was only executed because of the covenant or contract to be enforced in a court of equity holding grantor a trustee to uses. It therefore is seen that this whole transaction depends upon whether the grantor in good conscience at the time of her death should be considered a trustee for the grantees. If the whole transaction is permeated with fraud, equity will not compel the conveyance.

The assignments of error I, II, III and IV are so evidently erroneous as to need no more than the statement at the beginning of this brief.

These assignments of error involve only questions of fact which are not to be reviewed by this court.

Grayson v. Lynch, Supra.

Matters of pleading which were not objected to either in the trial court or in the supreme court are waived.

3 Corpus Juris 778-779, notes 29, 30, 31.

As pointed out in the statement of the case, there was a demand upon the plaintiffs-in-error before suit was begun and the question of pleading was not raised in the lower court or in the Supreme Court in the assignments in error or in the plaintiffs-in-errors' brief. Opinion of Supreme Court (Tr., pp. 393-394).

The court by its finding for the complainant thereby made a finding that there were no laches and

there is no statute of limitations to actions in equity in Hawaii.

Kaikainahaole v. Allen, 14 Haw. 527.
Hilo v. Liliuokalani, 15 Haw. 507.
Maile v. Carter, 17 Haw. 49.
Warren v. Nahea, 19 Haw. 382.
Kipahulu Sugar Co. v. Nakila, 20 Haw. 620.

The statute of limitations of Hawaii in real actions is ten years, but an action in equity, founded on actual fraud, is not barred by a statute, and the giving of the relief is a finding there were no laches, as laches is not the finding of a single fact but an inference from other facts, which may include many different elements.

Snow v. Boston Blank Book Manufacturing Co., 153 Mass. 456.

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